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SEP 22 2003

No. 03-281

IN THE

Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

SUZUKI MOTOR CORPORATION AND AMERICAN SUZUKI MOTOR CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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31pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the summary judgment standards set forth by this Court in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), by refusing—*after* reviewing the evidence submitted by both sides—to make credibility determinations or to weigh the evidence.

2. Whether the court of appeals correctly determined, under *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 654 (1989), (i) that a jury can infer actual malice from evidence that a publisher purposefully avoided addressing or rebutting a specific, technical criticism by a government agency of a "testing" methodology used to disparage a consumer product, and (ii) that a jury finding of actual malice based on other evidence can be buttressed by evidence of the publisher's financial problems.

RULE 29.6 STATEMENT

Plaintiff Suzuki Motor Corporation is the parent of Plaintiff American Suzuki Motor Corporation. General Motors of Canada Limited (a wholly-owned subsidiary of General Motors Corporation, a publicly traded company), owns 20.3% of Suzuki Motor Corporation.

All parties to the proceeding are listed in the caption of the case.

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INTRODUCTION

Any fair review of the panel's decision reveals that the court below faithfully applied settled standards governing a Rule 56 motion for summary judgment on a First Amendment issue of actual malice. In asking this Court to revisit those standards, the petition by Consumers Union of United States, Inc. ("CU"), all but ignores the fact that this Court has already addressed this issue not once, but twice, in the recent past. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). CU also ignores this Court's repeated teaching that, consistent with the Seventh Amendment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." 477 U.S. at 255. Instead, CU's petition treats *Anderson* as an irrelevancy, relegates *Masson* to a footnote at the end of its petition, and never even cites Rule 56.

Even more troubling (especially in a case in which candor is the central issue), CU bases its request for review—and particularly its claims of a conflict among the lower courts—on multiple, obvious mischaracterizations of the decision below. For example, CU accuses the panel of considering only the evidence submitted by the plaintiff, when, in fact, both the majority and concurring opinions explicitly considered the evidence submitted by *both* sides. CU also accuses the majority of holding that a jury could find "purposeful avoidance" based solely upon a "disagreement with [the] government," Pet. 28, when, in fact, the majority held that such a finding could be based, not on a disagreement, but on clear evidence that CU utterly *ignored* the government's specific finding that CU's testing methodology was "driver-dependent" and therefore easily manipulated.

Nor is there any basis for the suggestion by CU and its *amici* that the Court must now revisit the standards it estab-

lished in *Anderson* and unanimously reaffirmed in *Masson*, lest it risk the "death of consumer ratings," Pet. App. 49a (Kozinski, J.), or "chill core free speech," Pet. 24. Those settled standards provide robust protection for First Amendment values while still allowing egregious cases to be heard by a jury.

This is such a case. As the majority correctly concluded, there is clear and convincing evidence for a reasonable jury to find that CU fabricated its test results and then tried to cover up that fabrication. Whether a jury draws that conclusion will turn on questions of credibility which all agree can be resolved only by a jury.

COUNTER-STATEMENT OF THE CASE

This case concerns statements by CU that its tests showed the Suzuki Samurai, a small sport-utility vehicle, "easily rolls over in turns." CU published that statement, among other places, in the January 1996 60th Anniversary Issue of *Consumer Reports*. Ninth Circuit Excerpts of Record ("ER") 936. That issue, a promotional piece that touted CU's accomplishments, highlighted CU's 1988 review of the Suzuki Samurai. Under a staged photograph of a Samurai tipped up on two wheels, CU described how it had destroyed this once-popular sport utility vehicle:

> **1986** CU buys its own auto test track in rural Connecticut. Two years later based on tests conducted there, CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away.... (ER940.)

For present purposes, there can be no dispute that CU's statements about the Samurai were false. CU did not contest falsity in its motion for summary judgment. See CU Mot. for Summ. J., D. Ct. Docket No. 211, at 1. Nor has CU pursued the argument (advanced by Judge Kozinski below, Pet. App. 58a-59a, 61a) that its statements were pure "opinion" pro-

tected by the First Amendment, or that they were in some sense "accurate[]." Instead, the question presented at this interlocutory stage is whether the record contains sufficient evidence of CU's knowledge, or purposeful avoidance, of the falsity of its statements to support a jury determination of actual malice. Given the one-sided presentation in CU's petition (including its misleading references to "findings" by the district court[1]), and the *en banc* dissent's misreading of the summary judgment record, it is important to address with some care the key evidence on this point.

Contrary to the assumption of the *en banc* dissent, the "central facts that undergird Suzuki's claim" are not that the Samurai "did well on CU's standard course," but then "did far worse than its competitors" when "CU ... modified the course to make it more challenging." Pet. App. 49a. The central facts, rather, are that CU rigged the test and then lied about the Samurai's performance. Specifically, after the Samurai passed CU's very stringent standard testing with flying colors, CU employees deliberately rigged their additional testing (a) by first figuring out how to use stunt-like steering to make the Samurai tip up, then (b) using that information to design a course that was, in the government's words, "driver-dependent" and therefore subject to manipulation, then (c) driving the Samurai differently than other vehicles in that course, and (d) concealing that manipulation by failing to instrument the tests.

Contrary to CU's claim, Pet. 26-29, the evidence also shows that CU did more than "disagree[]" with NHTSA's assessment. In fact, CU purposefully avoided addressing NHTSA's key criticism: that CU's testing was so driver-

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[1] *E.g.*, Pet. 5, 6-7, 8, 9, 10 & n.2, 13, 30 (referring to the district court's supposed "findings" of "undisputed fact"). At summary judgment, a district court does not make factual "findings," and its conclusions—including its conclusions about which points are "disputed" and which are not—are reviewed de novo. 11 J. Moore, *Moore's Federal Practice* § 56.41[3][a] (2003).

dependent that it was scientifically invalid and misleading.

1. The Summer of 1988. Contrary to the impression CU seeks to convey, Pet. 6, the Samurai received wide acclaim in the automotive press following its 1985 introduction in the continental United States. ER752-85. And it was an immediate success: 150,000 Samurais had been sold in the United States by 1988. Pet. App. 3a. Perhaps because of this success, in early 1988 the Samurai was the subject of an unfavorable *NBC-TV* story purporting to show that it had a tendency to tip up in sharp turns. Supp'l ER ("SER") 77. The NBC tests were later rejected by NHTSA, along with CU's tests, as unscientific and driver dependent. ER735.

a. CU's 1988 Testing. Shortly after the *NBC-TV* story, CU began developing its own story about the Samurai's supposed propensity to roll over. ER194. CU's effort was spearheaded by Irwin Landau, CU's Editorial Director. ER1262-73. Because (as he later admitted) he wanted the article to have a "particular take," Landau assigned himself as both author and principal editor. ER1081-83, 1825-26.

"Never felt like it would tip over." On April 20, 1988, Landau and David Pittle, CU's Technical Director, made an unprecedented trip to CU's test track to see the Samurai's performance in CU's avoidance maneuver test. ER1176-77, 1550-51, 1553-55, 1824. The first maneuver CU conducted that day is now known as CU's "standard" or "long-course" avoidance maneuver, a test that CU had used since 1973. It is a severe, slalom-style lane-change maneuver. It was designed, according to CU, to replicate an emergency situation where a driver swerves a vehicle into the opposing traffic lane to avoid an obstacle and then steers quickly back into the original lane to avoid oncoming traffic. Pet. App. 3a-4a. As CU had known for years, this maneuver is "very stringent" and tests vehicles to the "limit" of their performance. ER2200 (Video Excerpt L), 875, 22.

Pittle invited Landau to attend the testing principally be-

cause he thought they would see the Samurai tip up. Pet. App 4a. But the Samurai did not tip up according to expectation. Instead, as shown by the videotapes (ER2200 (Video Excerpts A & B), 203) and test logs (ER201, 202) first obtained in discovery, the Samurai performed flawlessly in this demanding maneuver. Kevin Sheehan, CU's most experienced test driver, drove the Samurai repeatedly through CU's maneuver at speeds over 50 mph. Not once in 16 runs did the Samurai's tires leave the pavement. Pet. App. 4a; ER203, 977, 2200 (Video Excerpt A). Sheehan's evaluation states that the Samurai "never felt like it would tip over," Pet. App. 4a; ER201, and he rated the Samurai as highly as any of the four vehicles he tested that day. Pet. App. 4a; ER205. His conclusions were confirmed by a second test driver, Rick Small. Pet. App. 5a; ER205, 977.

By the end of CU's planned testing, the Samurai had been tested more rigorously—37 times at speeds up to 56.6 mph—than the other three vehicles CU was testing that day, the Isuzu Trooper II, the Jeep Wrangler, and the Jeep Cherokee. ER976-77. The Samurai had received higher overall stability ratings than any of them. And it had not "easily roll[ed] over in turns," as CU later claimed it had a propensity to do. ER1315, 976-77.

"If you can't find someone to roll this car, I will." If CU had ended the testing there—as was its established practice, ER1659-60—CU would have had to give the Samurai a stellar rating. However, according to eyewitness testimony by former CU employee Ron Denison, Landau was not satisfied with the results and said to one or more of the assembled testing personnel: "If you can't find someone to roll this car, I will!" Pet. App. 5a; ER1186-88.

Soon thereafter, David Pittle, an engineer who supervises CU's testing, ER1500, drove the Samurai through the course. He completed CU's standard course nine times without incident, achieving a top speed of 49 mph. Pet. App. 5a; ER978. However, on Pittle's tenth run (the Samurai's 47th), Pittle

wrenched the Samurai even more sharply than called for by CU's standard maneuver. As Sheehan later described it, Pittle began his initial left turn too late to get through the course cleanly, and thus was required to steer more violently back to the right. ER1652-53. As a result of Pittle's extreme steering, the Samurai's right wheels briefly lifted about eight inches off the ground. ER1366-67. Sheehan later testified that, if he were *trying* to make a vehicle tip up, he would have steered it exactly as Pittle did in his tenth run. ER1692-95.

CU's test videotape captured cheering and shouting as Pittle achieved Landau's stated objective of making the Samurai tip up. One onlooker yelled, "yeah!!!" Another employee exulted "I think I got that, I think I got that!," Pet. App. 5a; ER2200 (Video Excerpt C), 203, in a joyous tone that can only be appreciated fully by viewing the videotape.

"All right Ricky Baby." Having discovered a way to make the Samurai lift its wheels, Pittle then directed Robert Knoll, the head of CU's auto testing division, to re-design the avoidance course to "duplicate what [Pittle] did on [his tenth] run." ER1360-61, 1654, 1581. The modified course was, in effect, a stunt maneuver known as an "S turn," ER620, a manipulable procedure in which a skilled driver using the right steering inputs can cause almost any vehicle to tip. ER559-60, 588-89, 593-94, 611, 1370-71.

The evidence shows not just that this maneuver was more "challenging," as the *en banc* dissent put it. Pet. App. 49a. The evidence also shows that CU already *knew* that, using this kind of driver-dependent maneuver, many vehicles could be tipped up with sufficiently severe steering. ER1810-11. In fact, numerous vehicles can be made to tip up in CU's modified course, including vehicles that CU has rated "Acceptable." ER559, 588-89, 612-13, 1014, 1026, 1027, 1065-66, 1067, 2200 (Video Excerpts I-K).

On April 26, 1988, CU went back to the track for more "testing" on this new course. The videotapes show that, even

with Knoll's course modifications, CU's drivers, far from being able to make the Samurai "easily roll over," still had difficulty manufacturing a Samurai tip-up. ER203, 2200 (Video Excerpt D). The first driver was Fred Wood. Pet. App. 6a; ER1947. He made 14 runs on the modified course before achieving a tip-up. Pet. App. 6a; ER978, 1370-71. On the last run, after Wood got the Samurai to tip onto two wheels, Knoll is heard on the videotape saying, "That's it. That looked pretty good!" Pet. App. 6a; ER2200 (Video Excerpt E), 203. (Knoll later testified that he was "relieved" when Wood finally made the Samurai tip up. Pet. App. 6a; ER1401.)

CU then changed drivers. According to CU's test records, the second driver, Rick Small, was able to tip the Samurai on his second run, after which he too quit. Pet. App. 6a; ER207. Once again, CU's test track personnel cheered the result, with CU employee Joe Nappi shouting out: "All right, Ricky baby." Pet. App. 6a; ER2200 (Video Excerpt F), 203, 1011-12. This comment would later become the subject of a false affidavit signed by Knoll and four other CU employees in an apparent effort to discredit Denison, the whistle-blower who testified about Landau's threats to the testing staff.[2]

"[N]o lift off the ground, Oh God." After the April 26 testing, CU decided to label the Samurai "Not Acceptable." ER1381-84. But it scheduled another day at the test track for "shooting [a] movie"—for the national press conference CU had already planned. ER868-70, 1338, 1411.

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[2] After Denison testified in his deposition that Landau had threatened to "find someone to roll [the Samurai]," CU crafted a false affidavit signed by Knoll, test drivers Sheehan and Wood, and technical assistants Joe Nappi and Alan Hanks. Each initially swore he was present at the April 26, 1988 testing and that it was Denison who had cheered when Rick Small caused the Samurai to tip up. ER975. However, Knoll later admitted that this sworn statement was "not true." ER1394-95, 1403. Sheehan admitted he was not even present at the April 26, 1988 testing. ER1651, 1672. And Nappi admitted it was his voice, not Denison's, on the tape. ER195-96.

Once again, the videotapes show, not that the Samurai "easily rolled over," but that CU's drivers continued to have difficulty tipping it up. Apparently concerned about the impending press conference, Pittle at one point exclaimed: "Can't you just see it, we get no lift off the ground. Oh God." Pet. App. 7a; ER2200 (Video Excerpt G), 240, 1007-08. Eventually, however, CU's drivers were able to achieve the picture-perfect tip-ups CU has featured ever since.

A wealth of other evidence confirms that CU's inherently manipulable test was rigged to make the Samurai appear unstable.[3] Indeed, contrary to Judge Kozinski's assumption, Pet. App. 59a, the evidence shows that CU drivers drove vehicles other than the Samurai differently when they tested them—something of which the drivers and other testing personnel must have been aware. ER560, 589-90, 593-94 And expert testimony reveals that a tip-up of the Samurai could *only* be achieved deliberately. ER613, 614.

As the majority concluded, all of this evidence provides ample grounds for a jury to find by clear and convincing evidence that, when CU claimed its tests showed the Samurai "easily rolls over in turns," CU knew such statements were false. Indeed, contrary to the *en banc* dissent, Pet. App. 59a, a jury plainly *could* find this to be "a case where a defendant fabricates results and then purports to rely on them."

b. The 1988 Press Conference and Article. CU's subsequent conduct confirms this. On June 2, 1988, CU held a press conference to announce that it had tested the Samurai and rated it "Not Acceptable," and that CU planned to report this finding in the July 1988 issue of *Consumer Reports*. Pet. App. 7a; ER87, 987, 1968, 2200 (Video Excerpt L). During the press conference and in the subsequent article, CU per-

[3] For example, expert opinions establish that CU's modified course permits a driver deliberately to tip up a vehicle if he wishes to do so, ER559, and, absent instrumentation, to disguise that fact, ER560, 621-22. Indeed, as the government made clear, virtually any vehicle can be made to tip up in this test. ER613; see also *supra* at 6.

sonnel explained (correctly) that CU's test drivers had put the Samurai through both the standard maneuver and a newly devised "modified" course. Pittle and others then proclaimed that, based on this testing, the Samurai had an "unusually high propensity to roll over while performing an accident avoidance maneuver that could be demanded suddenly of any driver during routine driving." Pet. App. 7a-8a; ER876, 2200 (Video Excerpt L), 875. But the evidence shows this assertion—the gist of which was repeated in all the CU statements at issue here—was knowingly false.

"A Benign Maneuver." First, during the press conference, Pittle lied about the severity of the modified lane-change maneuver to lend plausibility to the claim that the Samurai "easily rolls over." He described the newly devised course as "benign," involving only "very limited steering inputs." Pet. App. 8a; ER2200 (Video Excerpt L), 875 (stating maneuver involved only 90 and 180 degree steering inputs). But Pittle has since admitted, and Knoll confirmed, that his characterization was "not accurate." Pet. App. 8a; ER1349, 1636-37. Sheehan testified that just getting through the new course required much more steering than Pittle had asserted—in fact, about 180 degrees of left steer, followed by 270 to 360 degrees of right steer. ER1696-97. This is significantly more steering that an ordinary motorist would employ, ER560, 596, because it generates about twice as much lateral gravitational force as the average lay driver is willing to endure, ER1362-63. Later evaluations showed that a tip-up required even more severe steering. ER559-61, 749-750, 1350-51. And CU's own test driver later admitted what the videotapes clearly show—that the maneuver was not "benign," as Pittle claimed, but in fact "sudden and violent." ER1698-99.

"Other vehicles passed the course with a yawn." At the press conference, Pittle also misrepresented the performance of other vehicles. He asserted that these vehicles—including the Isuzu Trooper II—had gone through the course with a "yawn." Pet. App. 8a; ER2200 (Video Excerpt L), 875. Yet,

on the unedited testing videotape, Knoll can be heard remarking that the Trooper II "is going to have a difficult time getting" through the modified course. ER1343-46.

Indeed, as Pittle later admitted, CU ran the Trooper II through the modified course only *four* times, and three of those times it failed by hitting cones. ER1627-31, 981. (This of course contradicts the *en banc* dissent's key assertion that "every other tested vehicle did pass" the short course. Pet. App. 61a.) Moreover, the evidence shows that, if CU employees had wanted to make the Trooper tip up, they could have done so with the same steering and timing strategy CU employed with the Samurai. ER559, 565, 577, 590, 593, 1026, 2200 (Video Excerpt I).[4] But that, of course, would have undermined CU's claim that the Samurai rolls over "easily" by comparison to other vehicles.

"Use a technical project and turn it into a fundraising appeal." CU's press conference and article produced the most extensive media exposure CU had ever received. ER871. This was particularly important at this point in CU's history because CU was, in the district court's words, "financially overextended" because of capital investments. Pet. App. 3a n.1. And CU knew its magazine sales and fundraising efforts would be more successful if it published an article exposing a "hidden" danger in a popular product like the Samurai. ER1249-51.

As a result of this publicity, CU was able to use the Samurai story extensively in its fundraising and subscription drives.

[4] Pittle stated at the press conference that the footage of the Trooper II "just didn't make it onto th[e] tape" that CU used at the press conference, ER2200 (Video Excerpt L), 875. Yet he later admitted that *he* had expressly directed his staff to exclude the Trooper II footage from the packet provided to the press. ER1626-27, 1631.

The evidence also demonstrates that CU employees drafted portions of the 1988 article giving favorable reviews to vehicles other than the Samurai *before* those vehicles were even tested, ER 1386-89, 1518-23—a strong indication they had already decided to single out the Samurai for unfavorable treatment, regardless of the test results.

Indeed, CU sent out millions of fund-raising and subscription solicitations featuring the Samurai story, ER903, 935, 1136-40—some within weeks of CU's press conference, ER896. In short, as reflected in minutes of a meeting of CU's own Board of Directors in May 1989, the Samurai story was a classic example of taking "a technical project and turn[ing] it into a fundraising appeal." ER911.

2. The Widespread Rejection of CU's "Testing." At the June 1988 press conference, CU also announced it was submitting its "findings" to the National Highway Traffic Safety Administration ("NHTSA") in support of a petition to recall the Samurai. ER876, 878, 238. In response, NHTSA observed that CU's testing had not been "instrumented" or otherwise "recorded for analysis," and that CU's modified maneuver was highly "driver-dependent," *i.e.*, subject to manipulation. ER735. Accordingly, NHTSA rejected the test procedures "because they do not provide for repeatable, reproducible results, and there are no accepted performance criteria. The testing appears to rely on the skill and influence of the driver ...." Pet. App. 10a, 288a. The agency further noted that, using CU's "modified course" maneuver, "probably any light utility vehicle could be made to roll over under the right conditions and driver input." *Id.* at 10a; ER735.

Faced with this stinging criticism, CU dodged the key issue. Although it published a critique of portions of NHTSA's analysis, see Pet. App. G, CU never responded to NHTSA's central criticism—namely, that CU had used a manipulable, driver-dependent maneuver, an error it compounded by failing to instrument its tests as a check on driver manipulation. Neither CU's published response to NHTSA, see *id.*, nor its internal research memorandum on the same topic, see Pet. App. I, articulated a basis for disagreement with NHTSA's analysis of this issue. It simply asserted that no instrumentation was necessary because "anyone could see that the Samurai tipped over during tests," *id.* at 286a—which of course ignored the criticism that such tip-ups could have been caused

by driver manipulation. Indeed, some of CU's own employees acknowledged that NHTSA's criticisms were accurate. *Id.* at 24a, 29a. Nor did CU respond to a similar critique by the British motor vehicle safety agency, the Transport Road and Research Laboratory. ER997-98.

According to Professor Edwin Guthman, a Pulitzer Prize-winning journalist and professor at USC, these and other failures were a breach of "basic journalistic standards" and strongly suggest that CU "had a predetermined outcome in mind," ER644, and that "CU turned a blind eye to the information that didn't support its view," ER647. The majority below held that a reasonable jury could reach the same conclusion on the same evidence. Pet. App. 16a.

3. Suzuki's April 1996 Complaint and CU's Reaction. Despite these repeated repudiations of CU's methods and its charges against the Samurai, CU resurrected its "easily rolls over" story in 1996, in its Anniversary Issue and elsewhere. At that point, Suzuki decided it could no longer tolerate the harm that CU's criticisms were doing, not only to the Samurai (which had been discontinued), but to sales of its other vehicles. ER947, 1820. Accordingly, it brought this lawsuit.

"More salt in the wound for Suzuki." Rather than retract its false statements, discipline the offending employees, or take other responsible steps, CU only intensified its disparagement. For example, CU used an August 20, 1996 press conference and an October 1996 article, both of which ostensibly focused on the Isuzu Trooper, to dredge up its disparaging story about the Samurai. ER2012-16. Tellingly, a CU employee's marginal note on a draft of that article observed that references to the Samurai were "more salt in the wound for Suzuki." ER951.[5]

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[5] CU attempts to divert attention from its rigged testing by pointing to irrelevant subsequent events like the discovery dispute at issue in the *Malautea* case, *see Malautea* v. *Suzuki Motor Corp.*, 148 F.R.D. 362 (S.D. Ga. 1991), *aff'd*, 987 F.2d 1536 (11th Cir. 1993); Pet. 8, which occurred *after* CU's testing. It is inconceivable that this event is relevant to

4. The Decisions Below. On May 3, 1999, CU moved for summary judgment on the sole issue of whether Suzuki could establish that CU acted with "actual malice" under the First Amendment standards articulated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). CU did *not* seek a judgment on the ground that its statements were accurate. Nor, contrary to Judge Kozinski's apparent assumption, Pet. App. 58a-59a, did CU contend that its reviews were statements of "opinion." The district court granted CU's motion and entered judgment against Suzuki on May 25, 2000, although it recognized the record contained "cartloads" of evidence on the issue of actual malice. *Id.* at 83a.

The court of appeals reversed and remanded for trial. The panel expressly applied the summary judgment standards articulated by this Court in *Anderson* and *Masson*. Accordingly, it recognized that it must resolve credibility issues and questions about the weighing of evidence in a light favorable to Suzuki. The court also recognized that it must conduct an "independent examination" of the record evidence. Pet. App. 14a. It thus surveyed the entire record, *including* CU's evidence, and concluded that "[a] reasonable jury could find by clear and convincing evidence that CU sought to produce a predetermined result in the Samurai test." *Id.* at 21a. In other words, a jury could find (under the appropriate legal standard)

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whether CU knowingly rigged that testing. Nor can it possibly be relevant that—again, *subsequent to* CU's rigged tests—CU became aware of lawsuits related to the Samurai, which were likely stimulated by CU's article. CU, moreover, neglects to mention that NHTSA twice denied recall petitions for the Samurai, ER734-36; that, in so doing, NHTSA concluded that "[t]he rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles," ER734; and that Suzuki has prevailed in four out of the five Samurai rollover suits tried to a jury and, in the fifth case, the jury verdict was set aside on appeal.

CU also cites an incident in which one of the Samurais it used in its testing rolled over on its side when its right wheels were driven up what CU calls a "six inch[]" snowbank. Pet. App. 235a. In fact, however, Suzuki's evidence shows that the snowbank was approximately 24 inches—high enough to cause almost any vehicle to tip over. ER552, 1015.

that CU rigged its testing of the Samurai, and therefore that CU acted with actual malice in claiming that its tests showed the Samurai "easily rolls over in turns."

The court also determined there was sufficient evidence to preclude summary judgment on the question whether CU purposefully avoided the truth about the driver-dependency of its testing procedures. Pet. App. 28a. After carefully reviewing the record, *id.* at 24a-28a, and rejecting select portions of Suzuki's argument, the court determined that CU had "done nothing to respond to the criticism of its testing procedures as overly influenced by driver input," *id.* at 28a. Indeed, the panel noted that "some CU personnel shared this assessment." *Id.* at 29a; see also *id.* at 24a. Thus, the court concluded, a reasonable jury could conclude that "CU's failure to address this deficiency"—a deficiency that was part and parcel of the manipulability of CU's tests—was a purposeful avoidance of the truth. *Id.* at 29a.

CU petitioned for rehearing *en banc*, asserting that the majority had held that "independent examination" simply does not apply at summary judgment. CU Pet. for Reh'g En Banc 1-2, 4-5. The court of appeals denied rehearing *en banc* over a dissent by Judge Kozinski. Pet. App. 48a. In denying rehearing, the majority filed an amended opinion that highlighted the fact that it had indeed conducted a full, independent review of the record. Compare *id.* at 13a-16a with 292 F.3d at 1198-1200. Judge Graber added a separate concurrence that did the same thing. See Pet. App. 30a. CU now seeks review of that amended opinion.

REASONS FOR DENYING THE PETITION

Given the standards articulated in *Anderson* and again in *Masson*, this case is, at bottom, a fact-bound, credibility-dependent dispute about the sufficiency of the evidence. As explained in *Anderson*,

> [W]here the factual dispute concerns actual malice,

> clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

477 U.S. at 255-56; accord *Masson*, 501 U.S. at 521.

CU's petition tries to make it seem that something far greater is at stake, including (1) whether "independent review" can be conducted at the summary judgment stage based only on the plaintiff's evidence, Pet. 17-22; and (2) whether the First Amendment permits a finding of purposeful avoidance based on a defendant's "disagreement with the government," *id.* at 26-30. However, as shown in detail below (in Sections I and II), each of these assertions, which form the heart of CU's petition, is based upon an obvious mischaracterization of the majority's opinion. Accordingly, these questions simply are not presented by the holdings below. Nor is there any basis for CU's claim that the lower courts are sufficiently confused about the summary judgment standard to warrant this Court's revisiting the rules laid down in *Anderson* and unanimously reaffirmed in *Masson*.

I. PETITIONER'S ARGUMENTS ABOUT APPROPRIATE SUMMARY JUDGMENT STANDARDS ARE PREMISED ON A MISREADING OF THE PANEL'S DECISION.

CU's arguments for review of the majority's application of the summary judgment standard badly distort the opinion below. And those distortions lead CU and its *amici* to make exaggerated and erroneous claims about the decision's potential to "chill core free speech." Pet. 24.

A. The Court Of Appeals Neither Created Nor Exacerbated A Circuit Conflict Because It Did Not Hold That No Independent Examination Is Required, Or That A Court Must Ignore A Media Defendant's Evidence On Summary Judgment.

This Court's cases have twice dealt comprehensively with the proper standard to apply at summary judgment on a question of actual malice. As explained in *Anderson*, in a "*New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." 477 U.S. at 255-56. In practice, as this Court reiterated in *Masson*, this means that the appellate court must first "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." 501 U.S. at 520; accord *Anderson*, 477 U.S. at 255. Then, conducting what *New York Times* called an "independent examination," 376 U.S. at 285, the court must determine for itself whether the totality of that appropriately-construed evidence is enough for a reasonable jury to find actual malice by clear and convincing evidence. *Anderson*, 477 U.S. at 254-56; see *Masson*, 501 U.S. at 513, 520-25 (reviewing evidence in the light most favorable to the nonmoving party to determine whether it "suffices" to show actual malice). Although CU buries the point in a footnote, it ultimately acknowledges that *Masson* (which reiterated and applied the standards from *Anderson*) sets forth the appropriate standards at the summary judgment stage. Pet. 24 n.6. There can be no doubt that the majority applied those standards here, and did so correctly.

1. In several places, CU suggests that the majority failed to conduct any independent review at all. Pet. 12, 17, 18, 22, 25. But that is obviously false. In applying the *Anderson/Masson* standards, the court of appeals expressly recognized that the appellate court "must independently examine

the record when reviewing the grant of summary judgment." Pet. App. 14a; *id.* at 15a, 16a, 30a (Graber, J., concurring in part) ("the independent examination rule applies at the summary judgment stage"), cf. *id.* at 39a (Ferguson, J., dissenting) (acknowledging the majority recognized the applicability of independent examination). Thereafter both Judge Tashima and Judge Graber separately concluded, after conducting their independent examinations, that the evidence created a jury question about CU's actual malice. *Id.* 16a, 35a (Graber, J.).

In short, CU's suggestions that the majority failed to conduct an independent examination are flatly contradicted by the opinions below. For the same reason, the decision below accords with the uniform approach of other courts—namely, that an independent review is required at the summary judgment stage.[6]

2. CU's principal attack on the panel's decision—and the centerpiece of its case for this Court's review—rests on yet another clear misreading of the majority's opinion. CU claims the court of appeals "refus[ed]" to consider all of the evidence in the case—*i.e.*, the evidence submitted by CU as well as Suzuki's evidence. Pet. 18; see also *id.* at 11, 13. Its *amici* in the media repeat the same claim. Br. Amici Curiae of ABC, Inc. et al. ("ABC Br.") at 7-8. Although this claim may help CU undermine the court of appeals' credibility with the public at large, the accusation is demonstrably false.

Nowhere did the court state that it was considering *only* Suzuki's evidence. Judge Graber clearly explained that the majority was "employ[ing] [a] standard of review" under which it "examine[d] independently *the entire record*." Pet. App.

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[6] *E.g.*, *Wells* v. *Liddy*, 186 F.3d 505, 520 (4th Cir. 1999); *Lytle* v. *City of Haysville, Kan.*, 138 F.3d 857, 862 (10th Cir. 1998); *Lundell Mfg. Co.* v. *Am. Broad. Cos.*, 98 F.3d 351, 358 & n.2 (8th Cir. 1996); *Liberty Lobby, Inc.* v. *Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988); *Schiavone Constr. Co.* v. *Time, Inc.*, 847 F.2d 1069, 1090-91 (3d Cir. 1988); *Zerangue* v. *TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *see also* cases cited *infra* note 8.

30a (emphasis added). Similarly, in analyzing the evidence, both Judge Tashima and Judge Graber repeatedly referred to "the record," without any suggestion that CU's evidence was being excluded. Pet. App. 14a, 15a (quoting *Anderson*, 477 U.S. at 255-56), 20a n.12, 30a (Graber, J.), 31a (Graber, J.). Indeed, Judge Tashima's opinion repeatedly cited and analyzed evidence that CU had presented in its defense. *E.g.*, *id.* at 28a.[7]

The decision below, therefore, is fully consistent with the cases cited by CU in support of the proposition that an appellate court must review the entire record, not just the plaintiff's evidence.[8] There is, accordingly, no conflict in the lower courts on this issue.

3. Significantly, CU does *not* accuse the majority of having

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[7] In the court of appeals, CU similarly accused Suzuki of contending "that the only record evidence a court may consider and must accept is that which Suzuki points to." CU Ct. App. Br. 38; *id.* at 37, 39. But Suzuki made clear that, "unlike the district court's analysis in this case (and contrary to CU's misrepresentation of Suzuki's position), the evidence must be aggregated and considered in its 'totality.'" Suzuki Ct. App. Reply Br. 5; *see also id.* at 3.

The fact that the majority reviewed the entire record also answers CU's assertion that reviewing the whole record was "outcome determinative" in this case because only those judges who did so (*i.e.*, the dissenters) voted for CU. Pet. 18. The difference in result is more plausibly explained by the dissenters' unwillingness to view the evidence through the evidentiary prism established by *Anderson* and *Masson*. *See infra* note 9.

[8] Pet. 19-21 (citing *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir. 1986); *Contemporary Mission, Inc.* v. *New York Times Co.*, 842 F.2d 612 (2d Cir. 1988); *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168 (2d Cir. 2001); *Yiamouyiannis* v. *Consumers Union*, 619 F.2d 932 (2d Cir. 1980); *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir. 1988); *Liberty Lobby, Inc.* v. *Rees*, 852 F.2d 595 (D.C. Cir. 1988); *Price* v. *Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989); *Secrist* v. *Harkin*, 874 F.2d 1244 (8th Cir. 1989); *Herbert* v. *Okla. Christian Coalition, Inc.*, 992 P.2d 322 (Okla. 1999); *Perez* v. *Scripps-Howard Broad. Co.*, 520 N.E.2d 198 (Ohio 1988)). Notably, nearly all of these cases were decided before *Masson*. Accordingly, if there ever were a circuit split on this point (and we are aware of none), it was resolved by *Masson*.

erred when it rejected CU's main argument below—namely, that in a First Amendment case on summary judgment, the evidence need *not* be viewed in the light most favorable to the nonmoving party, but in fact can be weighed in favor of the media defendant. CU Ct. App. Br. 7, 38; Pet. App. 19a (recognizing CU had urged the court to weigh the evidence). Instead, CU now recognizes that on "summary judgment, [the court] must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and the *weight* to be accorded particular evidence." Pet. 24 n.6 (emphasis added); see also *id.* at 18 n.4 (abandoning argument that independent examination is from the court's perspective, rather than that of a reasonable jury); ABC Br. 9, 11, 12 (acknowledging that "factual disputes," "reasonable inferences" and "'questions [of] credibility'" must be resolved in Suzuki's favor).[9] This concession is both appropriate and dispositive: No post-*Masson* appellate decision of which we are aware has weighed evidence or made credibility determinations under the guise of conducting an "independent review" at the summary judgment stage. See Pet. 19-21 (citing cases).[10]

CU's tacit admission on this point is important because it

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[9] The dissenting judges, by contrast, repeatedly indicated that they were viewing the evidence in the light most favorable to *CU. E.g.*, Pet. App. 42a (Ferguson, J.) (resolving in CU's favor the disputed issue of CU's motivation for adopting a new test); *id.* at 60a-61a (Kozinski, J.) (same); see also *id.* at 40a (Ferguson, J.) (opining that CU had good motives because it is a testing organization).

[10] Although CU does not press the point in its petition, it has previously argued that a passage from *Liberty Lobby* v. *Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir. 1987), holds that the normal rule that evidence presented on a motion for summary judgment is construed in favor of the nonmoving party does not apply where actual malice is concerned. *Id.* at 1293. As CU apparently recognizes, however, any such suggestion (if it were ever a fair reading of the D.C. Circuit's decision) has been eliminated by *Masson*'s reaffirmation of the principle that the normal summary judgment standards apply when actual malice is at issue. 501 U.S. at 520. Thus, even if there had once been a conflict on this point, *Masson* resolved it. *See* Suzuki Opp'n to Pet. for Reh'g at 11-12, 13.

disclaims the central argument of the Ninth Circuit dissenters and, indeed, CU's own *amici* here. In his dissent from denial of rehearing *en banc*, for example, Judge Kozinski argued that independent examination requires the reviewing court at the summary judgment phase to "weigh[] the evidence," Pet. App. 52a, thereby contravening the usual summary judgment test. Judge Ferguson appears to have taken the same approach, *id.* at 41a-42a, as do CU's *amici*, ABC Br. at 9. However, as CU now seems to recognize, that is plainly wrong. As the Court put it in *Masson* (in a statement the *amici* simply ignore, see *id.* at 6-7 n. 4), "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility *and of the weight to be accorded particular evidence*." 501 U.S. at 520 (emphasis added).[11] Allowing a judge to weigh evidence at the summary judgment stage would circumvent the Seventh Amendment's guarantee that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States." And it would be an enormous, judicially-crafted exception to Rule 56(c).[12]

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[11] Accord *Anderson*, 477 U.S. at 249 ("the judge's function is not himself to weigh the evidence"); *id.* at 255 ("the weighing of the evidence" is a "jury function[], not th[at] of a judge"); Pet. App. 15a ("contrary to the dissent's suggestion, the independent examination rule of *New York Times* is consistent with our well-established procedural rules governing review of summary judgment motions"). The Court in *Masson* specifically "declined" to engage in such weighing there. 501 U.S. at 521. And *none* of the decisions cited by the *amici* on this issue, *see* ABC Br. 9 n.10, claimed the right to weigh the evidence on a motion for summary judgment. To the contrary, one of those cases expressly held that "trial judges are to refrain from weighing evidence at the summary judgment stage." *Welch* v. *Am. Publ'g Co.*, 3 S.W.3d 724, 730 (Ky. 1999).

[12] *Amici* and the dissent fear the media's being forced to defend at trial a case in which a verdict for the plaintiff would not survive post-verdict judicial review. But they appear to misunderstand the panel's proper recognition that the *application* of independent review at summary judgment necessarily differs from post-trial review because the body of evidence is different. Pet. 11-12 (discussing Pet. App. 32a (Graber, J.)); ABC Br. 9-10, 13-17. Post-verdict, the court accepts, at a minimum, all factual find-

B. Adhering To Settled Summary Judgment Standards In This Case Would In No Way Spell "The Death Of Consumer Ratings."

Contrary to the arguments of CU and its supporters, allowing this case to proceed to trial will hardly herald "the death of consumer ratings," Pet. App. 49a, or otherwise chill legitimate speech, Pet. 24-26; ABC Br. 3-4, 16. For one thing, those concerns are largely based on a reading of the panel's decision that is, as explained above, erroneous at best. But these concerns are misguided for other reasons as well.

1. Much of the concern about the potential impact of a trial in this case hinges on an assumption that CU's statements are either non-actionable statements of opinion or are, in fact, true. See Pet. App. 58a-60a. CU, however, does not dispute that its summary judgment motion did not rest on either of these grounds, but instead rested solely on the issue of actual malice.[13]

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ings that the jury must have made to support the verdict. *See Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 690 (1989). At summary judgment, by contrast, the evidence on all disputed issues is viewed in a light favorable to the non-moving party. *Masson*, 501 U.S. at 520. To equate the record on summary judgment with the record on trial denigrates the essential role of the jury in weighing evidence and assessing credibility.

The concern about purported asymmetry, moreover, assumes that *Bose* allows a reviewing court to weigh the evidence, not only after a bench trial (as in *Bose*), but after a jury trial. *Anderson*'s general statement that "[c]redibility determinations [and] the weighing of the evidence ... are jury functions, not those of a judge," 477 U.S. at 255, casts substantial doubt on that assumption. But whether or not a court can appropriately weigh the evidence after a jury trial, and whatever other uncertainties may exist as to the standard to be applied on post-verdict review, those issues provide no basis for revisiting the clear summary judgment standard adopted in *Anderson* and reaffirmed in *Masson*.

[13] For this same reason, the *en banc* dissent is incorrect in suggesting that CU's "disclosure" of its testing methodology insulates CU from a finding of actual malice. Pet. App. 56a-59a. Disclosure is relevant only where a statement is one of opinion rather than fact. Furthermore, as the

In most cases, media defendants surely will believe their statements are demonstrably true or are statements of opinion. They will, accordingly, seek summary judgment on these grounds as well and, if they prevail, will avoid a jury trial.

2. Concerns about the burdens of litigation also ignore the fact that a media organization, when it learns of compelling evidence that its employees have published a false statement, can retract the false statement and, if necessary, discipline the employees involved. That is what the *New York Times* and *NBC News* have done in the face of recent scandals involving employees who violated the public trust.[14] There is no evidence that such responsible actions have "chilled" protected speech.

3. The policy arguments advanced by CU and its *amici* also ignore another important goal of this Court's First Amendment jurisprudence: to avoid undue interference with the application of State laws designed to protect the public (including businesses and their employees) from false and malicious statements. As Chief Justice Warren noted long ago, "the First Amendment does not include absolute license to destroy lives or careers." *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring in result). Nor does it include an absolute license to destroy consumer products and, with them, the "lives and careers" of those who make and sell them. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). And that, of course, is why this Court has consistently held that '[t]hose who publish ... falsehoods with the requisite culpability ... are subject to liability, *the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury.*" *Herbert* v. *Lando*, 441 U.S. 153, 172 (1979)

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evidence shows, CU's tests were both manipulable and rigged—facts that CU certainly did not disclose.

[14] *See* D. Barry, *Correcting the Record*, N.Y. Times, May 11, 2003, at A1; J. Hall, *Chief of NBC News Quits in Wake of Rigged Crash*, L.A. Times, Mar. 3, 1993, at A1.

(emphasis added).

In this case, Suzuki seeks nothing more than an opportunity to allow a jury to decide whether CU's false and damaging statements were made with "the requisite culpability." To allow Suzuki that opportunity does not impermissibly infringe on CU's right of free expression, precisely because (as the majority below held) a jury could conclude by clear and convincing evidence that CU acted with actual malice. When the evidence shows that an organization rigs its testing, lies about the test, refuses to correct its mistakes in the face of criticism from government regulators and republishes its false statements, a jury trial is the appropriate response in our system of justice.

4. Finally, contrary to the suggestion by CU and its *amici* (and by the Ninth Circuit dissenters), there is no reasonable likelihood that revisiting the *Anderson/Masson* standards could affect the outcome of this case. As Judge Graber properly recognized, Suzuki's case against CU turns largely on the credibility of CU's employees and, in particular, Messrs. Landau, Pittle and Knoll. Pet. App. 32a n.1 ("In this case, the credibility of a number of CU's employees is of paramount importance to the 'actual malice' inquiry."). And as Judge Kozinski and the media *amici* acknowledge, *id.* at 51a; ABC Br. 9, 11, 12, credibility determinations clearly must be left to the jury. Accordingly, summary judgment is singularly inappropriate in this case.

First, as noted above, it was Landau, CU's Editorial Director, who announced at the test track that, if CU's test drivers could not "roll" the Samurai, Landau would find someone who could. Pet. App. 5a. Landau claims that he never made the statement and, alternatively, that *if* he did, it was made in jest. ER 1437. But sworn testimony by Denison shows that Landau made the statement and made it as a threat, not a joke. Moreover, Landau was understood to "suggest to someone from the auto test division to find a result." ER 1188, 1190.

This dispute as to whether Landau made the statement, and if he did, what his intent was, is precisely the sort of disputed credibility determination that should be resolved by a jury and accordingly, at this stage, must be resolved in favor of Suzuki. *Masson*, 501 U.S. at 520 (the reviewing court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence"); *Anderson*, 477 U.S. at 255. Thus, for CU to avoid a jury trial, the Court would not only have to reject the *Anderson/Masson* standard. It would also have to jettison the principle, derived from the Seventh Amendment and embodied in Rule 56, that credibility determinations *must* be left to the jury.[15]

The same is true of another critical issue, namely the intent of Mr. Pittle (CU's Technical Director) when, on the Samurai's 47th trip through CU's course, he finally got the wheels of the Samurai to lift up. Pittle asserts that he merely wanted to see how a small SUV handles. Pet. App. 5a. Suzuki's evidence, by contrast, demonstrates that Pittle, in wrenching the vehicle the way someone would do if he were trying to make the vehicle tip, ER1692-95, was responding to Landau's expressed desire to manufacture a Samurai "roll." See *supra* at 5-6. And the conclusion that Pittle's goal was to tip the Samurai is confirmed by the overjoyed reactions of CU's other personnel on a videotape made well *before* CU knew that its conduct would be the subject of a lawsuit. See *supra* at 6-7. In short, Pittle's intent is yet another disputed credibility determination that must be resolved by a jury.

This is particularly so in light of Pittle's subsequent misrepresentations about the Samurai testing. See *supra* at 9-10. A reasonable jury could conclude that, when Pittle lied at the

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[15] Nor can this statement be dismissed as simply an indication of "bias." Pet. App. 62a (Kozinski, J.). This is not just an indication that Landau disliked the Samurai or Suzuki. It is evidence from which a reasonable jury could conclude that Landau *intended* to have the Samurai tipped at all costs, even if a tip-up could only be accomplished by a rigged test.

press conference by saying the test was "benign"—and compounded that misrepresentation with a pantomimed and equally false demonstration of *gentle* steering he supposedly employed when driving the Samurai, ER 2200 (Video Excerpt L)—he did so in an effort to bolster the false claim that the Samurai "easily" tips up, and to mask his own complicity in the test rigging. Again, this is a classic issue of credibility that must, under any conceivable Rule 56 standard, be resolved by a jury.

The same is true as to the intent of Mr. Knoll (head of CU's auto testing division) in designing and implementing the new course that formed the basis for CU's subsequent criticisms of the Samurai. Was his intention, as Knoll has claimed and the *en banc* dissent assumes, simply to create a more "challenging" course that could be used to determine whether the Samurai was less stable than other comparable vehicles? Pet. App. 49a; ER1360-61; SER 69. Or was it, as Suzuki's evidence shows, to create a maneuver that would allow CU's test drivers to use stunt-like steering when driving the Samurai, without being detected, and therefore to make the Samurai *appear* more prone to rollover than other vehicles? See *supra* 5-6, 8, 11; ER 559-60, 620.

If a jury resolved these credibility issues against CU and concluded that CU acted as Suzuki's evidence reveals, no amount of "weighing" could overcome the jury's resolution of these factual disputes in Suzuki's favor.

II. PETITIONER'S ARGUMENTS ABOUT "PURPOSEFUL AVOIDANCE" ARE LIKEWISE BASED ON A MISREADING OF THE PANEL'S DECISION.

CU also asserts that the court of appeals' holding on "purposeful avoidance" would permit CU to be held liable merely for "disagreement with [the] government," Pet. 28, and that the court of appeals erred in its analysis of CU's financial motive. These arguments find no basis in the panel's opinion.

1. Under *New York Times*, a plaintiff may demonstrate actual malice by proving that the publication was made (1) "with knowledge that it was false"; *or* (2) "with reckless disregard of whether it was false or not." 376 U.S. at 279-80. Under the reckless disregard theory, liability will attach for "purposeful avoidance of the truth." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 692 (1989).

Based on its review of CU's evidence, the court of appeals (after rejecting portions of Suzuki's argument on this point, Pet. App. 23a-28a), determined that one aspect of Suzuki's claims of purposeful avoidance should reach the jury. Specifically, the court found a jury issue as to whether CU ignored widespread criticism that its rollover tests, as the NHTSA put it, were so manipulable or "driver-dependent" that "probably any light utility vehicle could be made to roll over under the right conditions and driver input," and that the absence of instrumentation made it impossible to reproduce those tests. ER735; Pet. App. 10a, 288a. As the court of appeals recognized, CU's testing was also criticized on this basis by the British Department of Transport, and even some CU employees believed the tests were driver-dependent. *Id.* at 24a. The court of appeals properly recognized that this critique was sufficiently damning that CU's utter refusal to address it could be the basis of a jury finding of purposeful avoidance. *Id.* at 24a-25a.

CU's challenge to this analysis distorts the court's opinion in two respects. First, CU contends that the court "found 'purposeful avoidance' based on a disagreement with a government agency." Pet. 28; see ABC Br. 17-18 (repeating this assertion). This characterization is simply inaccurate. The basis for potential liability was not a "disagreement." Rather, it was CU's failure even to consider this serious and technical critique of its testing methodology. Such willful blindness to a specific criticism is not a "well-articulated disagreement," Pet. 2, but is instead classic "purposeful avoidance," *Harte-*

Hanks, 491 U.S. at 692.[16]

Second, as part of its argument that the majority failed to consider the entire record, CU incorrectly asserts that the court "recognized but deemed irrelevant" the fact that CU issued a response to the NHTSA report. Pet. 27. But in reality, the majority expressly discussed CU's response to the NHTSA report, Pet. App. 25a-28a, and indeed relied upon it as a basis for rejecting certain of Suzuki's arguments about purposeful avoidance. The court recognized, however, that with regard to the concern about driver-dependency, CU turned a blind eye. See generally Pet. App. G, I (CU's published and internal reaction to NHTSA). That was the basis of the court's holding, not a simple "disagreement" with the government.

Because this case is thus not really about "disagreement with the government," the policy concerns outlined by the dissent, Pet. App. 66a, and CU's *amici*, ABC Br. 18-20, are not implicated here. Of course the media, like anyone else, may disagree with the government. But fabricating test results, and blinding oneself to a critique of the flawed testing that enabled those results, hardly constitutes a protected "disagreement" with the government. And the fact that CU conducted the tests itself, and fabricated the very news that it purported to report, distinguishes this case from the examples cited by CU's *amici*. See ABC Br. 19-20.

2. Nor does the question of "financial motive" merit this Court's attention. Pet. 29-30. Contrary to CU's argument, this Court explained in *Harte-Hanks* that evidence of a media

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[16] For the same reason, the *en banc* dissent is incorrect to assert that CU's choice of testing methods is "just one side of a long-running debate over how to test rollover propensity most effectively," as purportedly evidenced by subsequent federal legislation. Pet. App. 66a. Moreover, the dynamic rollover tests proposed in the wake of this legislation would use a mechanical "steering controller" for the very purpose of eliminating the manipulability inherent in CU's test. 67 Fed. Reg. 62528, 62538 (Oct. 7, 2002).

organization's financial motive *is* valid circumstantial evidence of actual malice. 491 U.S. at 668. Thus, it is clear that motive may be a relevant factor even if, taken by itself, it "cannot provide a *sufficient* basis for finding actual malice." *Id.* at 665 (emphasis added). And, that is precisely what the court of appeals held here. Pet. App. 22a ("While CU is correct that financial motive cannot, by itself, prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry. *See Harte-Hanks*, 491 U.S. at 668...").

CU's suggestion that the court erred in finding that a defendant's financial condition can be relevant to actual malice, Pet. 30, thus flies in the face of *Harte-Hanks*. And CU's apparent effort to obtain a reexamination of the evidence on this point, *id.* ("here there is absolutely *no* evidence from which one could reasonably infer that CU lied because of financial considerations"); see also ABC Br. 17-18 (arguing that the court put "undue reliance" on this factor), provides no basis for certiorari. Sup. Ct. R. 10.

III. GIVEN ITS INTERLOCUTORY POSTURE, THIS IS NOT AN APPROPRIATE CASE IN WHICH TO ADDRESS THESE ISSUES IN ANY EVENT.

Even if there were a legitimate need to revisit the First Amendment standards applicable to suits against media defendants, this is not an appropriate case in which to do so—aside from the fact that it does not really present the issues CU claims.

That is because this case comes to the Court in an interlocutory posture, and it is well-settled that this Court virtually always "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari). As the Court explained long ago, certiorari jurisdiction is "to be exercised sparingly," and therefore, lack of finality may "of itself alone" provide "sufficient ground for the denial" of certiorari. *Hamilton-Brown*

Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, having concluded that a reasonable jury could determine by clear and convincing evidence that CU's statements about the Samurai were made with "actual malice," the court of appeals remanded to the district court for further proceedings, including a trial on Suzuki's claims. Thus, the decision of the court of appeals is interlocutory, and not yet "ripe for review" by this Court. *Bhd. of Locomotive Fireman* v. *Bangor & Aroostock*, 389 U.S. 327, 328 (1967) (per curiam).

Nor is this a case in which the specific summary judgment issue sought to be presented could arise *only* in an interlocutory posture. If another court applied the standard sought by CU (to the extent an alternative standard can be gleaned from CU's petition), and if summary judgment were *granted* to the defendant and affirmed on appeal, the plaintiff would then have a final judgment from which to seek review in this Court.[17]

Moreover, the considerations supporting the general rule against review of interlocutory appeals apply with full force here. Of particular relevance is the canon of constitutional avoidance, by which "[t]he Court will not 'anticipate a ques-

[17] This case also does not fall into one of the narrow categories of cases appropriate for interlocutory review when they arise from State courts, *see Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479-83 (1975), a fact that, although not dispositive, strongly indicates that review is inappropriate. Contrary to CU's suggestion, Pet. 18, this is not a case in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case"—the third *Cox* category. 420 U.S. at 481. If Suzuki prevails at trial, CU may renew its First Amendment argument at that time, including any issues peculiar to summary judgment. R. Stern et al., *Supreme Court Practice* § 2.3, at 75 (8th ed. 2002) (citing cases).

Nor is this a case in which a decision to adopt new First Amendment standards would "be preclusive of any further litigation on the relevant cause of action." *Cox Broad.*, 420 U.S. at 482-83. As shown above (at 23-25), unless the Court were to reject the prohibition on courts making credibility determinations—a prohibition CU does not challenge—a decision to impose more press-friendly summary judgment standards would hardly guarantee victory to CU.

tion of constitutional law in advance of the necessity of deciding it.'" *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). As this Court has repeatedly recognized, "it is precisely the policy against unnecessary constitutional adjudication that demands strict application of the finality requirement." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 75 (1987) (Stevens, J., dissenting). Just last Term, several members of this Court recognized this principle when the Court dismissed a writ of certiorari as improvidently granted—in a case, like this one, involving allegations that First Amendment rights had been violated by an interlocutory ruling. See *Nike, Inc.* v. *Kasky*, 123 S. Ct. 2554, 2558 (2003) (Stevens, J., concurring in dismissal of writ because of the "difficult First Amendment questions raised in this case").

Here, awaiting final judgment would prevent the Court from unnecessarily deciding issues of constitutional law, including sensitive issues about the extent to which the First Amendment can override both the Seventh Amendment and State law.[18] Awaiting final judgment is therefore the appropriate course in this case, even if the Court believed any of the issues raised in the petition were otherwise worthy of review.

CONCLUSION

The petition for a writ of certiorari should be denied.

[18] To address any of the issues raised by CU, the Court would first have to consider whether the "actual malice" requirement even applies to an action for product disparagement. This issue—which was preserved below, Pet. App. 17a n.11—was expressly left open in *Bose*, and this Court has not yet addressed it. If certiorari were granted, Suzuki would likely raise that issue as an alternative ground for affirmance.

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September 22, 2003